

EXHIBIT B



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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

May 21, 2004

Via E-Mail, Followed by U.S. Mail

Ron Lavigne
Assistant Attorney General
Office of the Attorney General
Ecology Division
2425 Bristol Court S.W., 2nd Floor
P.O. Box 40117
Olympia, WA 98504-0117

Re: *Washington Toxics Coalition v. EPA*,
No. C01-0132C; Order Dated January 22, 2004

Dear Ron:

We understand that the Washington Department of Ecology has recently issued a permit to the Department of Agriculture that would allow aquatic applications of 2,4-D to Lake Washington, and possibly other surface waters, for noxious weed control. Such applications are prohibited by Judge Coughenour's Order, referenced above, in Washington Toxics Coalition v. EPA, for two reasons: 1) the Order does not allow aquatic applications; and 2) to the extent private landowners are acting under the guise of the Department of Agriculture's permit, such applications are not "administered by public entities," as required by the Order. Order at 9.

As attorneys for plaintiffs in that case, we were involved in negotiating, drafting, and presenting to the Court the language included in its January 22, 2004, Order. We thought it would be helpful for Ecology to understand the context in which the Order was entered so that it may revisit its decision to issue its permit or to allow these aquatic applications.

The active ingredients covered by this litigation were selected because of their toxicity to threatened and endangered salmonids or their detection by the U.S. Geological Survey in surface waters of the Pacific Northwest. 2,4-D, the active ingredient at issue here, has been detected in salmon watersheds throughout the Northwest, including King County, at or above established levels for aquatic life. In one USGS study, 2,4-D was also detected 100 percent of the time in

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urban streams in Puget Sound. The frequency of detections of 2,4-D in our region, together with its being found at or above aquatic life criteria, presents a hazard to listed salmonids.

The purpose of the litigation is to have EPA comply with Section 7 of the Endangered Species Act by carrying out its mandatory duty to consult with the National Marine Fisheries Service (NMFS) on the effects of these active ingredients, including 2,4-D, on threatened and endangered salmonids. Because EPA's consultation process is so lengthy, and because of the current harm to salmonids caused by the presence of these active ingredients in water, the Court imposed injunctive relief to minimize harm pending EPA's compliance with the ESA.

The Order authorizing injunctive relief is premised on the use of buffers, 20 feet for ground applications, and 100 feet for aerial applications, to keep these active ingredients out of "Salmon Supporting Waters" (defined to include Lake Washington). Order at 3-4. The Order includes several buffer variations for certain ingredients or application methods, and two types of exemptions: 1) for public health vector control programs "administered by public entities," for which no buffers are required; and 2) for noxious weed programs "administered by public entities," for which NMFS safeguards, including buffers, apply. Order at 9, III.D.2.

The "Noxious Weed Programs" discussed in the Order at pages 9-10 requires safeguards that NMFS "routinely requires." The record evidence submitted in the case includes biological opinions from NMFS on the use of herbicides, including 2,4-D, for noxious weed control. In none of the biological opinions does NMFS authorize the application of 2,4-D (or any other active ingredient, for that matter) to salmon waters. Rather, for pesticides that EPA has registered under FIFRA for aquatic application (such as 2,4-D), NMFS has allowed terrestrial applications within 15 feet of salmon waters by methods designed to reduce drift and run-off, such as "spot spraying, wicking, dipping, painting, and injecting." See, e.g., Endangered Species Act Section 7 Consultation Biological Opinion: Effects of 2002 Herbicide Treatment of Noxious Weeds on Lands Administered by the Salmon-Challis National Forest, National Marine Fisheries Service, September 16, 2002, at 6, Table 3. For this reason, the language of the injunction that "Only those Pesticides registered by EPA under [FIFRA] for aquatic application can be used within 15 feet of Salmon Supporting Waters," Order at 9, III.D.2.d, refers to the NMFS safeguard that the amine formulation of 2,4-D may be used within a 15-foot buffer of salmon waters, but may not be applied directly to water.

It is apparent that aquatic applications are not authorized by the Order, even for the category of active ingredients otherwise registered by EPA under FIFRA for aquatic applications, when Paragraph III.D.2.d is read in conjunction with the rest of the Order, including the paragraph that immediately follows it. Paragraph III.D.2.e provides that "Pesticides cannot be used when precipitation is occurring or is forecast to occur within 24 hours." The reason that NMFS adopted this safeguard in its biological opinions, and why it is repeated in the Order here, is to prevent the contamination of surface water through run-off

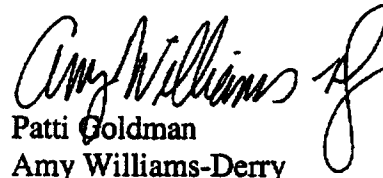
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caused by precipitation. Obviously, there would be no need for such a generic safeguard if aquatic applications were allowed.

Second, only those noxious weed programs that are "administered by public entities" are exempt from the Order's standard buffers. Anticipated applications of 2,4-D to Lake Washington, paid for by private landowners who contract independently with herbicide applicators, do not fit within this category. Instead, each private landowner would be engaging in independent, nongovernmental spraying activities. Although Ecology has issued a permit to the Department of Agriculture, the independent actions of private landowners, even under the guise of this permit issuance, does not constitute a program "administered by a public entity." We understand that the herbicide applicators are independent contractors with no agency or employment relationship with the State of Washington. We further understand that these herbicide applicators must agree to indemnify, defend, and hold harmless the State of Washington from all civil and criminal liability, including liability under the Endangered Species Act. These facts do not translate into a noxious weed program "administered by a public entity," as the Order requires.

We would welcome the opportunity to discuss this matter with you further or to answer any questions you may have.

Sincerely,



Patti Goldman
Amy Williams-Derry

cc: Wayne Hettenbach, counsel for EPA